

*NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO OCTOBER 6, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

UNITED STATES OF AMERICA

v.

NATHAN CRAIGUE

* * * * *

*

*

*

*

*

*

*

*

1:19-cr-142-01-LM
February 20, 2020
9:45 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Government:

John S. Davis, AUSA
United States Attorney's Office

For the Defendant:

Dorothy E. Graham, Esq.
Behzad Mirhashem, Esq.
Federal Defender's Office

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603)225-1442

1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for
3 consideration today a motion hearing regarding a motion
4 to dismiss in criminal case 19-cr-142-01-LM, United
5 States vs. Nathan Craigue.

6 THE COURT: All right. Attorney Graham, go
7 ahead.

8 MS. GRAHAM: Thank you.

9 Your Honor, this is somewhat of an unusual
10 case because the government is contending that my client
11 made a false statement and not a factual statement that
12 we would tend to see on a regular basis, like my shirt
13 is red or it's blue or something that can easily be
14 disproved, but it's one based on my client's
15 understanding of a complicated and multidimensional
16 criteria definition that's often litigated in courts.
17 And that is, what is an employee.

18 The indictment fails to provide sufficient
19 notice to Craigue concerning the elements of the
20 offense, specifically, as I've outlined, what is an
21 employee, and this case hinges on what is an employee.

22 THE COURT: Do you have case law that you can
23 give me that would show or hold that the government does
24 need to include that definition in the indictment? It
25 includes the elements; you're saying it's just missing

1 that -- that piece, the definition of employee.

2 Do you have case law that would help me on
3 that? Because the requirements of a sufficient
4 indictment are not overly demanding. It's got to state
5 the elements and the nature of the crime.

6 MS. GRAHAM: Yes, your Honor, but I think we
7 are -- the false statement is the element. The falsity
8 in and of itself, where that's the element, that the
9 four corners do not define exactly what does -- what
10 does that element mean.

11 And so I think that that can't be supplied by
12 discovery. It can't be supplied by any other facts or
13 notice within the government's, you know, discovery. It
14 is a notice that needs to be contained within the four
15 corners. And just saying it's a false statement without
16 a true understanding of what that actually means does
17 not provide him with sufficient notice.

18 But as to a specific case, no, I do not -- I
19 can't cite to a specific case.

20 THE COURT: I did not try the *Munyenyenzi* case,
21 but I have vague -- a vague understanding. And as I
22 recall, the government charged her with making a false
23 statement on her naturalization app and I think one of
24 the false statements was she described herself as
25 somebody with good moral character.

1 And I -- -- did the indictment -- is it
2 required that the government specify what that means?
3 Obviously the government charged in *Munyenyezi* that she
4 was a genocidaire and was involved in essentially mass
5 killings. But ultimately, that phrase, good moral
6 character, I don't think the government had to define.
7 I'm just trying to think of other examples of cases --

8 MS. GRAHAM: Right.

9 THE COURT: -- like this one. And I agree it
10 seems unusual.

11 MS. GRAHAM: I think that what is -- makes
12 this case distinguishable is that employee has
13 potentially so many different meanings within the legal
14 community or within the -- the definitions provided to
15 the Court when they're instructing the jury that these
16 are the elements, but not only the elements, but these
17 are the factors that you need to consider.

18 And given that this is a -- a -- it's a legal
19 term in a sense; it's not one that can be easily decided
20 by -- by a --

21 THE COURT: So it would be -- I'm trying to
22 think of another example.

23 An accident, car accident; police pull over,
24 the driver gets out and says, I was not negligent.
25 Negligent would be a legal --

1 MS. GRAHAM: Correct.

2 THE COURT: -- term. And so it would be akin
3 to essentially charging him -- he said, I was negligent
4 (sic), when he knew then and there that he was, in fact,
5 negligent.

6 MS. GRAHAM: Correct.

7 THE COURT: And how would --

8 MS. GRAHAM: I think --

9 THE COURT: How would the jury go about
10 determining whether or not that was a false statement
11 when it's got legal ramifications?

12 MS. GRAHAM: Right. I think ultimately, for
13 instance, in this case, the jury is going to need to be
14 instructed that employee means such and such and such.
15 I mean, according to the *Darden* factors, the jury's
16 going to have to be told what is the definition that
17 they are to use when applying the facts of the case
18 to -- to the law in deciding if, in fact, this
19 individual was, in fact, an employee. And, therefore,
20 if he was an employee, then, therefore, that statement
21 is true and his statement is false.

22 So I -- I see that the jury is going to have
23 to sift through all of the facts of the case and apply
24 them to all of those factors as the government says is
25 under common law agency factors -- or the standards

1 presented in *Darden*.

2 THE COURT: Okay. Go ahead. I interrupted
3 you with questions. Go ahead.

4 MS. GRAHAM: That's fine.

5 May I just have one moment, your Honor?

6 THE COURT: Yes.

7 MS. GRAHAM: I think -- I believe the
8 government's response to our argument is that the
9 indictment is sufficient, but that requires us to make
10 certain assumptions. And from looking at the
11 indictment, Mr. Craigue can't assume that the government
12 means employee in the context of OSHA or that the OSHA
13 definition applies because it preempts state
14 definitions, or that it means employee in a legal
15 context specific to an OSHA investigation versus a
16 colloquial context understood by nonemployers.

17 All of that assumes that the reader -- the
18 reader must assume from the indictment the intent of the
19 government, and that assumption just cannot be made here
20 because there is no other indicator from that word,
21 false statement of an employee. There's nothing within
22 the four corners to identify what factors need to be
23 addressed or challenged at trial.

24 Your Honor, that is -- that's -- I'll rest on
25 my pleadings for that argument.

1 THE COURT: Okay. Attorney Davis.

2 MR. DAVIS: Your Honor, I don't have much.

3 The Court asked for case law. I think the
4 closest thing to a case is the *Kahre* case, K-a-h-r-e,
5 cited in the government's brief. That's not -- it's not
6 a false statement case, but it's a tax case on page 6 of
7 our brief. But a similar argument is made there on a
8 motion to dismiss an indictment and the Court had no
9 problem denying that motion.

10 And I would say the -- the controlling supreme
11 court case is *Hamling*, which says that a legal term of
12 art need not be defined in an indictment. I think
13 that's the guidance, the supreme court guidance, that's
14 out there.

15 THE COURT: *Hamling* is --

16 MR. DAVIS: I'm sorry. That's cited on --

17 THE COURT: I looked for *Kahre* on page 6.

18 MR. DAVIS: Page 6.

19 THE COURT: Oh, I'm looking at the wrong
20 thing. Sorry.

21 MR. DAVIS: Yeah.

22 THE COURT: Okay. Yeah.

23 MR. DAVIS: I should have where *Hamling* is.

24 THE COURT: That's all right. As long as --
25 it's H-a-m-l-i-n-g?

1 MR. DAVIS: H-a-m-l-i-n-g.

2 THE COURT: Okay.

3 MR. DAVIS: So, your Honor, the Court raised a
4 hypothetical, an interesting hypothetical, which was
5 what if the -- a defendant walked up and said, I was not
6 negligent.

7 To me, a better analogy or a better example
8 here is say there was a car accident in which ownership
9 of the car is somehow material and at the accident
10 scene, the defendant walks up to the police officer and
11 the police officer says, do you own that car? And the
12 person said, I am not the owner of the car.

13 In that scenario, there are -- certainly
14 ownership of a car is a legal property interest concept.
15 There may be -- there may be definitions about it, there
16 may be nuance to whether he was lending the car to his
17 son-in-law and which garage it was staying in at that
18 time and who was paying the insurance on it, but if the
19 defendant says, I didn't own the car and, in fact, he
20 had bought the car and it was registered to him and he
21 often drove it, I can imagine the government saying, you
22 made a false statement when you said you -- you did not
23 own that car. And in an indictment, the false
24 statement, the material false statement, would be the
25 defendant made a false statement when he said he didn't

1 own the car.

2 And I don't think the proper remedy would be
3 to dismiss that indictment on the ground that, well,
4 ownership -- there could be state law, UCC concepts and
5 factual issues and it could be very confusing here. To
6 me, that would be a similar sort of morass and clearly
7 not the right result.

8 I mean, the question of employee is -- it
9 certainly is a legal term, we agree with that, but it's
10 also a fundamental term in employer-employee relations
11 and in the building industry.

12 It's a very practical term because it's one
13 that a small businessman has to assess maybe every day
14 in terms of whether he's paying worker's comp or not or
15 whether he's doing payroll taxes or whether a -- how
16 he's doing tax accounting at the end.

17 It's also not a particularly technical term.
18 It's a -- it's a common law agency doctrine. It's based
19 on the common law. It's based on Restatement (Second).
20 And it is something that people in commerce have applied
21 for hundreds of years.

22 And so to say that it's -- it's, you know,
23 based on my client's understanding, it's so
24 multifaceted, it's so difficult -- well, we simply
25 dispute that and -- it's a legal term, but it's a

1 fundamental, basic, practical, old common law notion and
2 we can use that term with precision. And when people
3 make false statements about it, we can fairly prove that
4 they intentionally made a false statement.

5 Now, maybe we can't prove it. That's what the
6 trial is for. That's what the jury is for.

7 THE COURT: So if he --

8 MR. DAVIS: But --

9 THE COURT: Let me ask you this. If he does
10 not testify -- and obviously you've given discovery to
11 Attorney Graham, because she references it in her --

12 MR. DAVIS: Right.

13 THE COURT: -- motion.

14 If he doesn't testify, how do you prove what
15 his knowledge was?

16 MR. DAVIS: From circumstantial evidence.

17 THE COURT: Okay. Does he -- I mean,
18 ultimately, ownership of a car, you know, that's
19 something that is accessible to a jury in terms of what
20 does he do to exhibit ownership. Those are -- those are
21 concepts that I think are -- are fact-based and easy to
22 understand.

23 This, however, there -- there's no question
24 there are all kinds of cases resolving the question of
25 whether someone's an employee or a contractor. So how

1 do you prove that -- without him testifying, how do you
2 prove what was in his mind on this issue? That's what
3 I'm interested in.

4 MR. DAVIS: By circumstantial evidence and by
5 his conduct. The --

6 THE COURT: Circumstantial evidence and what?

7 MR. DAVIS: And by his conduct.

8 THE COURT: Okay.

9 MR. DAVIS: That the -- we are working on a
10 *Darden* factor analysis. I don't -- I don't have it yet,
11 but it is overwhelmingly in favor of a finding of --
12 that he's an employee; that Kenneth McKenna, the
13 decedent, was an employee.

14 And so the jury's going to be able to say,
15 okay, here's what an employee is, here's all the
16 different aspects of the relationship, including
17 everything he did here, about his -- his employment of
18 Kenneth McKenna.

19 And we're also going to be able to show -- for
20 instance, as I note in the footnote, he called -- when
21 he first talks to the other employee -- who's a very new
22 hire -- at the scene, who -- who actually is there when
23 Kenneth McKenna dies, and this young guy calls
24 Mr. Craigue, who's off-site, to report this terrible
25 thing, what Mr. Craigue says is, basically, remember,

1 you're a sub.

2 And that shows intent, in our view,
3 overwhelmingly. That is, that even in a tragedy here,
4 Mr. Craigue is very quickly making sure that his story
5 and his facade, which has saved him a whole lot of
6 money, is maintained and that reality is covered up
7 here. That shows intent.

8 And I mean, your Honor, there's many, many,
9 many cases where intent has to be proved beyond a
10 reasonable doubt and we don't have a confession and we
11 don't have a legal document that says -- that
12 establishes the issue.

13 THE COURT: Uh-huh. Do you have anything
14 maybe he signed or he said other than that one
15 statement? Maybe checking off boxes that would indicate
16 he knew they were -- they were actually employees?

17 MR. DAVIS: Not that I can think of.

18 THE COURT: Okay. I agree that's not a good
19 fact, but ultimately proving what is in his mind is
20 ultimately what you're going to have to persuade the
21 jury, that he knew what he was saying was false.

22 MR. DAVIS: Yeah. Yeah.

23 THE COURT: Do you agree with defense counsel
24 that the jury has to be instructed somehow on the common
25 law that you're talking about with respect --

1 MR. DAVIS: I think the jury does have to be,
2 because the statement has to be actually false. And so
3 the definition of employee is -- is something they have
4 to decide; was it a false statement, was it objectively
5 false.

6 That's a question --

7 THE COURT: Okay.

8 MR. DAVIS: And so to know what is an
9 employee, I think the *Darden* factors do have to be --
10 which is easy enough to do, but we -- we've assumed
11 that, yes.

12 THE COURT: Okay. So you're assuming that the
13 proposed jury instructions you give me will actually
14 include the *Darden* factors.

15 MR. DAVIS: Correct.

16 THE COURT: So you agree with defense counsel
17 on that point?

18 MR. DAVIS: Correct. I think that would be --
19 that would be helpful.

20 THE COURT: Okay.

21 MR. DAVIS: I don't have -- I don't think I
22 have -- I mean, I guess I think the last thing I'll say
23 is the -- the defense has not made any effort that I
24 can see, either in the brief or in here, to show some
25 difference that matters in some definition of employee

1 that's different from *Darden*.

2 And that's -- that's an important question, I
3 think. If there were some separate definition that's --
4 that applies in some other jurisdiction and that
5 definition made the -- the question of whether Kenneth
6 McKenna was a -- was an employee a lot closer question
7 than it is here and there was some reason to think that
8 the defendant had in his mind a confusion about whether
9 that separate jurisdiction's definition applied, this
10 argument is a lot closer.

11 But -- but there is no such showing. What the
12 defendant says is, well, there's New Hampshire
13 definitions. Well, New Hampshire definitions are also
14 based on Restatement (Second). And the definition of
15 employee, although multifaceted, although there's a lot
16 of different things to look at, the actual concept is
17 not particularly difficult and it is, again, a practical
18 one.

19 And, sure, there can be applications -- just
20 like with ownership of a car, you can imagine nuance and
21 difficulty, but it doesn't mean that -- that there's
22 something technical about this definition that's --
23 that's different from some other definition somewhere
24 that accounts for or could account for confusion. The
25 defendant's -- the defense hasn't showed that. It's

1 just said, well, there's *Darden* factors and there's no
2 definition in the indictment and it's not sufficient
3 here.

4 This is not -- in the government's view, this
5 is not a close motion to dismiss.

6 THE COURT: The second -- Count Two, his --
7 obviously the question is -- is not ambiguous as it's
8 alleged here because it's asking whether these two --
9 two were employees, but then his statement is -- he's
10 describing how he treated them. And do you -- you have
11 proof that he did not treat them in that manner?

12 MR. DAVIS: Well, he -- it's a little awkward
13 because it's a double negative, but what he's saying is
14 I would always treat them as not employees. What he
15 means there is I would treat them as contractors, which
16 is the -- the other side of that coin. He doesn't say
17 contractors, but he says not employees. And in the
18 context, and given everything -- all the testimony about
19 that particular interview, it's going to be clear that
20 that's what he's saying.

21 THE COURT: Right. But the statement in the
22 indictment is I've always treated them -- they would
23 come and go as they please.

24 That could conceivably be true even if he
25 knows them to be employees, that they would come and go

1 as they please, so he didn't control them in that way
2 all the time. That seems to me to be more problematic
3 in terms of -- in terms of, you know, the -- the charge
4 here, false statement, because you've got to prove that
5 they didn't come and go as they please, at least from
6 Mr. Craigue's understanding.

7 MR. DAVIS: I don't agree with that, your
8 Honor.

9 THE COURT: Okay.

10 MR. DAVIS: The operative falsity there is I
11 would always treat them as not employees, and they would
12 come and go as they please is a qualification and -- and
13 certainly a -- as a -- as a practical matter, of course
14 they come and go as they please. Whether they're
15 employees or not, it's still a free country. They may
16 decide they don't want to come to work today.

17 THE COURT: Yeah, but you have to prove the
18 falsity of the statement. The statement is in quotes in
19 the indictment.

20 MR. DAVIS: Well, what --

21 THE COURT: You're saying what he really said
22 is they're --

23 MR. DAVIS: He was asked how -- how he --
24 whether he treated them -- he was asked whether they
25 were employees of his company, and he said they always

1 come and go as they please. And that is not the gist of
2 the false statement. It is quoted in the indictment.

3 THE COURT: Uh-huh.

4 MR. DAVIS: I suppose we could do a bill of
5 particulars or if there are -- I mean, I don't want to
6 play games here, but the -- the falsity is I would
7 always treat them as not employees. That's what we're
8 talking about here.

9 THE COURT: Right, the way he treated them.
10 So you would have to have proof that he didn't treat
11 them --

12 MR. DAVIS: Correct.

13 THE COURT: -- in that manner. Right?

14 MR. DAVIS: Correct.

15 THE COURT: Okay. All right.

16 Anything further, Attorney Graham?

17 MS. GRAHAM: I do, your Honor, just to follow
18 up on one of the questions about how would the jury be
19 instructed.

20 And I don't mean to suggest that the jury
21 should only be instructed on *Darden* because, as the
22 Court pointed out, the -- they have the burden -- the
23 government has the burden of proving what was my
24 client's understanding of what an employee is.

25 And so I think it's also -- I also would

1 suggest that they should be informed as to what
2 employee-employer status is under New Hampshire law
3 because the government has to prove, well, what was his
4 mental state, what was his understanding.

5 And so I do believe that the jury should have
6 a full understanding of what the definition of employee
7 or subcontractor is.

8 THE COURT: Let me ask just a practical
9 question.

10 So there's also another motion and it is --
11 multiplicitous counts motion. That is not really going
12 to be ripe until, I think, March 2nd, which is also the
13 day of the final pretrial, and the trial's scheduled for
14 March 17th.

15 Is this -- do you envision this going to trial
16 as scheduled?

17 MS. GRAHAM: I do, your Honor, yes.

18 THE COURT: You do.

19 MS. GRAHAM: Yes.

20 THE COURT: Okay. So you ultimately are
21 keeping this essentially on the original trial track?

22 MS. GRAHAM: Yes.

23 THE COURT: And you agree with that as well,
24 Attorney Davis?

25 MR. DAVIS: I think it was continued once,

1 your Honor --

2 THE COURT: Okay.

3 MR. DAVIS: -- but, yes, Ms. Graham has told
4 us she thinks it's a likely trial --

5 THE COURT: Okay.

6 MR. DAVIS: -- so ...

7 THE COURT: Yeah.

8 MS. GRAHAM: May I just have one moment, your
9 Honor?

10 THE COURT: Yes.

11 MS. GRAHAM: Your Honor, just to address
12 the -- the void for vagueness argument, I just -- the
13 only response I had to the government's motion was -- or
14 response was that I disagree with the government's
15 contention that the void for vagueness argument is
16 premature. I don't believe the issue -- that issue's
17 not dependent on the jury's determination about the
18 facts surrounding the definition and so I -- I don't
19 believe that it's a premature argument and I just wanted
20 to address or respond to the government's statement.

21 THE COURT: All right. Anything further from
22 anyone?

23 MR. DAVIS: Nothing further, your Honor.
24 Thank you.

25 THE COURT: All right. I'll take this under

1 advisement.

2 Court is adjourned. Thank you.

3 (Proceedings concluded at 10:12 a.m.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

Submitted: 7/8/2020

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR